"avoid paying an initiation fee to the Newark local" (Opp., p. 3).[4]

[4] The Opposition attempts in two ways to suggest that it was wrongful for the union to rely on Fisher's action in securing a withdrawal card to conclude that Fisher had voluntarily quit and thus lost his seniority status at the Bronx plant. Although they are irrelevant to the critical issue of the union's motivation, a closer scrutiny of these efforts may be instructive as measuring the lengths to which the Board is driven in attempting to impute an illegal motive to a totally neutral act.

In order to show that Fisher did not benefit from obtaining the withdrawal card the Memorandum in Opposition draws a distinction between "permanent" and "temporary" transfers. Here again is an argument whose source is the imagination of Supreme Court counsel rather than the reasoning of the Board or the findings and record of this case. The Board's decision draws no distinction between permanent and temporary transfers, an omission which is entirely understandable, since none is drawn in the bylaws dealing with withdrawal cards. If the Board had thought such a distinction material to the legality of the union's motive it would have been forced to dismiss the complaint, since the evidence shows that when Fisher applied for the withdrawal card he said that he was leaving the Bronx plant and was going to work in Newark permanently. (JA 84-87, testimony of Fisher; JA 128-129, testimony of Petitioner's business agent McIntyre.) *Indeed, Fisher made no effort to return to work in the Bronx plant until he was laid off in Newark due to a reduction in force which was subsequent not only to the reopening of the Bronx plant but also to the November conference where the union stated that Fisher had lost his Bronx seniority.* (Pet. p. 16a)

There is an innuendo in the Opposition (p. 3), first advanced by the Court of Appeals (Pet. p. 2a), that Local 84 should not have dunned Fisher for the initiation fee because the plant manager had told him that his work there would be only temporary. Of course, the statement of the Newark plant manager was not communicated to Local 50 and so cannot have any bearing on its motivation. Moreover, the plant manager was wrong, since, as the General Counsel stipulated at the beginning of the hearing, seniority could not be transferred from one Ward plant to another, or retained at one plant while the employee was working at another. (JA 7). If the Newark manager misled Fisher to the latter's detriment, that is not an unfair labor practice on the part of

The Board relies on an additional misconception of the *Radio Officers* holding with respect to motive. It states:

> "Also, as in *Radio Officers,* enforcement of the rule by affecting the employee's job opportunities tended to encourage "union membership." (Opp. p. 8, emphasis supplied)

The assertion that *Radio Officers* supports a finding of illegality where discrimination has a "tendency" to encourage union membership is then twice repeated (Opp. p. 8; id. p. 9). That is not the holding of *Radio Officers.* The rule is that in order to find a violation the union must *intend* to encourage (or discourage) union membership. 347 U.S. at 42-44. Specific proof of intent can sometimes be omitted, but only where the conduct has a *necessary and forseeable* effect of encouragement, not where there is only a "tendency to encourage," id. at 44-46. Yet here the Board found at most (the Brief in Opposition claims no more) such a "tendency." Thus, contrary to the Court of Appeals, specific proof or intent *was* essential to establish a violation. The Board's present reliance (Opp., p. 9), on language in *Radio Officers* that any employer discrimination at the urging of a union is for a motive proscribed by the Act, is misplaced. That statement was superseded in *Teamsters Local* v. *Labor Board,* 365 U.S. 667, 675-676. See also *Labor Board* v. *News Syndicate,* 365 U.S. 695, 699-700.

Local 50. Nor does it controvert the fact that Fisher was benefited by taking the withdrawal card by avoiding the payment of the initiation fee. And while the illegality of any action by Local 84 could in no event be imputed to Local 50, the Board expressly assumed that Local 84 was within its rights in insisting on that payment. (Pet. pp. 18a-19a, n. 3)

B. With respect to the *Radio Officers* issue, the Court below erred not only on the merits, but in the manner of review. We pointed out in the Petition for Certiorari (pp. 13-14) that the Board's decision was unclear as to whether it, like the Court of Appeals, considered this case as coming within the narrow category of conduct for which specific proof of intent was unnecessary. The Brief in Opposition (p. 9) appears to embrace the reasoning of the Court of Appeals, though without elucidating what in the Board's decision justifies such a reading. But it does not thereby meet the issue raised by the Court's willingness to assume the basis of the Board's decision, which is a clear violation of the *Chenery* principle, applied to Labor Board decisions as recently as *Labor Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438. Moreover, even if the Court of Appeals correctly divined the Board's meaning, it should have required the Board to explain why specific proof of motivation was unnecessary. *Textile Workers* v. *Darlington Co.*, 380 U.S. 263, 276-77. Since the situation here is not "virtually the same" (Opp. p. 9) as in *Radio Officers* (see pp. 4-5, *supra*) nothing said by the Board in that case can substitute for the necessary findings in this case. Additionally, the Court of Appeals plainly erred in placing absolute reliance on the Board's "expertise in labor disputes" (Pet. p. 7a) and failing to determine independently whether the union's "conduct carried its own badge of improper motive," as *Labor Board* v. *Brown*, 380 U.S. 278, 292 requires.

The Court further abdicated its review responsibilities by failing to consider, in the face of a dissent addressed to this very point, whether "active membership" within the union bylaw constitutes "member-

ship" within § 8 (a) (3). See Pet. pp. 14-16. Particularly if the phrase "encourage" is given the broad scope which the Court sanctioned, it is essential that "membership" be carefully circumscribed, lest every discharge or seniority determination at the instigation of a union lead to an unfair labor practice charge. The theory of the Opposition that active membership means "active during a strike" would avoid this problem, but as we have seen, only by adding a new and unsupportable finding to the Board's decision, likewise in violation of *Chenery*.

II.

The second question presented by the Petition is whether the legality of the union's conduct under § 8 (a) (3) may turn on whether or not the basis of its action is incorporated in the collective bargaining agreement. That question is totally ignored by the Brief in Opposition, which asserts that there is only one "QUESTION PRESENTED" (Opp. p. 2) and which in its Argument makes no reference to any matter discussed after p. 17 of the Petition. Yet it is clear from the Opposition itself that this issue is critical to the case. In a span of ten pages, the Brief in Opposition five times relies on the fact that the union rule respecting withdrawal cards was not incorporated in the collective bargaining agreement. Opp. pp. 2, 5, 6, 6-7, 9-10.[5] The Board claims that because the parties could immunize their conduct by appropriate provision in the collective bargaining agreement there is no interference with collective bargaining. (Opp. p. 9-10).

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[5] Indeed, the final footnote in the Opposition relies on the same statement in the Board's decision to which the Petition had pointed to show that the decision squarely presents the issue. See Pet. p. 17.

This completely overlooks the point (Pet. pp. 18-19) that the parties' decision whether to spell out in the collective bargaining agreement all possible circumstances under which an employee shall lose his seniority or to leave this determination to the grievance procedure when a particular case arises is itself a judgment which Congress has committed to collective bargaining.

The Petition demonstrated (pp. 18-19) that the statute leaves no room for the contention that the legality of the union's conduct here may depend on the language of the agreement. If any arguments contrary to our position were available, able and resourceful Board counsel would have found and advanced them. Their tactical silence should not enable the Board to avoid this Court's consideration of the issue.

CONCLUSION

With respect to the first Question Presented, the Petition urged that the Board and the Court have erroneously decided an important question regarding the scope and meaning of *Radio Officers* v. *Labor Board,* 347 U.S. 17. The Board's Brief in Opposition seeks to defend its order on the merits, but does not deny that the issue is significant. The legal issue of motivation which is at the heart of this case has its direct antecedent in *Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45 which first upheld the constitutionality of the predecessor of § 8 (a) (3) on the assumption that the statute authorized the Board to invalidate private determinations with respect to employee hire only on proof of a purpose to interfere with associational rights. A decision which materially alters the line between the licit and the illicit, and which attributes

an illegal motive to wholly neutral conduct, plainly merits review by this Court. Review here is appropriate for the additional reason that in sustaining the Board's order the Court of Appeals violated several principles which this Court has established for review of Labor Board decisions in § 8 (a) (3) cases and of administrative decisions generally. This series of errors urgently calls for the exercise of the Court's supervisory powers as in the cases cited at Pet. p. 12. Finally, the question whether parties must spell out in advance the basis of all hire or seniority determinations or risk unfair labor practice charges is of obvious and uncontroverted importance to all future collective bargaining negotiations.

The Petition for Certiorari should be granted.

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